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No. 80-1895

In the Supreme Court of the United States

OCTOBER TERM, 1980

EXXON CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner's challenge to a trade regulation rule failed to present a live case or controversy subject to judicial review in light of petitioner's failure to allege how the rule could have any effect on its business operations.

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OPINION BELOW

The order of the court of appeals dismissing the petition for review (Pet. App. 1a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1980. A petition for rehearing was denied on February 9, 1981 (Pet. App. 8a). The petition for a writ of certiorari was filed on May 11, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On December 21, 1978, the Federal Trade Commission promulgated a trade regulation rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures" (16 C.F.R. Part

436, 43 Fed. Reg. 59614 (1978)).[1] The Rule seeks to prevent unfair and deceptive acts and practices that the Commission found to be prevalent in the sale of franchises and business opportunity ventures. It requires franchisors to disclose to prospective franchisees certain material facts regarding the franchisor, the business to be franchised, and the terms of the proposed franchise relationship. 16 C.F.R. 436.1(a). The Rule also requires a franchisor to have a "reasonable basis," supported by documentation, for any claims of potential earnings or past earnings of franchise outlets before it makes any such claims to prospective franchisees. 16 C.F.R. 436.1(b), (c), and (e). The Rule became effective October 21, 1979 (44 Fed. Reg. 49966).

Petitioner Exxon Corp. was one of a number of companies that petitioned for review of the Rule pursuant to Section 18(e) of the Federal Trade Commission Act, 15 U.S.C. 57a(e). Exxon is engaged, *inter alia*, in the franchising of retail gasoline stations. In its submissions to the court of appeals, Exxon did not state with specificity its ground for asserting standing to seek review of the Rule. It argued in its briefs, *inter alia*, that no rule was necessary to prevent abuses in the conduct of its business because its relationship with its franchised dealers already was regulated by the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. (Supp. III) 2801 *et seq.* (Joint Brief for Exxon, *et al.*, at 29 n.26).

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[1]The Rule was promulgated pursuant to the Commission's rulemaking authority under Section 18(a)(1) of the FTC Act, 15 U.S.C. 57a(a)(1). Section 18(a)(1)(B), 15 U.S.C. 57a(a)(1)(B), authorizes the Commission to "prescribe * * * rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of * * * section 5(a)(1) of [the FTC] Act [15 U.S.C. 45(a)(1)])," and also provides that such rules "may include requirements prescribed for the purpose of preventing such acts or practices."

While the petition for review was pending, Exxon and other petroleum companies filed with the Commission a request for exemption from the Rule pursuant to Section 18(g) of the FTC Act (15 U.S.C. 57a(g)). The request stated that an exemption should be granted because the PMPA "regulates all significant aspects of the relationships between petroleum companies and their dealers" (Exxon, *et al.*, Memorandum of Aug. 18, 1980, Exh. C, at 5). Exxon did not attempt to justify an exemption with respect to any businesses other than those covered by the PMPA, nor did it mention any such businesses that it believed might be covered by the Commission's Rule.

On July 17, 1980, the Commission issued an order in which it accepted the argument that application of the Rule to activities covered by the PMPA was unnecessary, and accordingly exempted from all aspects of the Rule the sale or promotion of "franchises" as defined in the PMPA (Pet. App. 2a-6a). The Commission thereafter moved in the court of appeals to dismiss Exxon's petition for review without prejudice on the ground that the Commission's exemption mooted the controversy with respect to business activities subject to the PMPA, and that Exxon had not alleged that the Rule would have any effect on its other business operations. Exxon opposed the Commission's motion, contending that it was entitled to a blanket exemption for *all* businesses it *might* engage in, and not only those covered by the PMPA. It refused, however, to identify or describe any such additional businesses. The court of appeals dismissed Exxon's petition for review "without prejudice to the right of [Exxon] to contest the validity of the rule or its application in any appropriate future proceeding" in which a live "case or controversy" might be presented (Pet. App. 1a).

ARGUMENT

1. The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and does not warrant further review. The

court of appeals' decision rests on the established principle under Article III of the Constitution that a party seeking judicial review must allege such a "personal stake in the outcome of the controversy" (*Baker* v. *Carr*, 369 U.S. 186, 204 (1962)) as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution" (*Flast* v. *Cohen*, 392 U.S. 83, 101 (1968)). See *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99-100 (1979); *Warth* v. *Seldin*, 422 U.S. 490, 498-499 (1975); *Harris* v. *McRae*, No. 79-1268 (June 30, 1980), slip op. 20-21. In the court below, Exxon failed to allege facts showing that it will be adversely affected in any respect by the Rule's requirements. Indeed, nowhere in its petition in this Court does Exxon identify any concrete interest injured or threatened by the Commission's rule that would serve as a predicate for invoking the judicial power. Such an interest is an indispensable requirement for judicial review under Article III. *Sierra Club* v. *Morton*, 405 U.S. 727, 740 (1972); *United States* v. *SCRAP*, 412 U.S. 669, 685 (1973); *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976); *Ashcroft* v. *Mattis*, 431 U.S. 171, 173 (1977); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 73-74 (1978).

Exxon attempts in its petition, as it did in its submissions in the court of appeals, to treat the Commission's exemption of businesses covered by the PMPA as an assertion by the Commission that all of petitioner's other businesses are covered by the Rule.[2] This line of argument is without

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[2]Exxon asserts (Pet. 6, 15, 19, 20, 21) that the Commission has taken the position that certain of its other business activities are covered by the Rule. These assertions apparently are based on the fact that the exemption applies only to businesses covered by the PMPA. To the extent Exxon's assertions may seem to rest on some affirmative statement by the Commission or its staff respecting the Rule's application to

merit. Neither the Commission nor the courts can make such a determination absent some identification by Exxon of business activities that might arguably be covered by the rule. Such an identification would not, as Exxon seems to contend, amount to a concession of coverage, but rather would serve as an allegation of a concrete interest entitling it to review. Of course, it is the duty of the party seeking to invoke the jurisdiction of an Article III court to allege specific facts showing that it has suffered " 'distinct and palpable injury' " that is likely to be redressed if relief is granted. *Gladstone, Realtors* v. *Village of Bellwood, supra*, 441 U.S. at 100. And it is the absence of any alleged impact on any of petitioner's businesses that formed the basis for the court of appeals' order of dismissal.

2. Exxon invokes Section 18(e)(1)(A) of the FTC Act, 15 U.S.C. 57a(e)(1)(A), to support the argument that the court of appeals erred in denying preenforcement review (Pet. 8-14). However, the statute does not purport to and could not grant such a right to those who lack standing under Article III. See *Gladstone, Realtors, supra*, 441 U.S. at 100. The statute simply provides that review of a Commission trade regulation rule may be sought by "any interested person (including a consumer or consumer organization)." There is no indication, in either the statute or the legislative history, that by this language Congress intended to broaden the category of persons who could seek review beyond that permitted by the Administrative Procedure Act (see *Sierra*

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any of Exxon's other businesses, the assertions are totally inaccurate. Indeed, as the Commission advised the court of appeals (Memorandum of Sept. 2, 1980, at 3, 4, 11, 21; Memorandum of Oct. 10, 1980, at 4, 5, 11; Memorandum of Oct. 29, 1980, at 1-2), it knows of no other businesses of Exxon that might be covered by the Rule—and Exxon has identified none. Another oil company, Marathon Oil Co., did in fact request the Commission's views as to some of its other businesses. It received an advisory opinion that such businesses were not covered by the Rule (Memorandum of Oct. 10, 1980, at 1-2).

Club v. *Morton, supra*, 405 U.S. at 731-740).[3] Nor should it be assumed that Congress intended to go beyond the "minimum constitutional mandate" that "[a] federal court's jurisdiction * * * can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action * * *.' " *Warth* v. *Seldin, supra*, 422 U.S. at 499; see also *Buckley* v. *Valeo*, 424 U.S. 1, 11 (1976); *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972); *Sierra Club* v. *Morton, supra*, 405 U.S. at 732 n.3.

Exxon further argues (Pet. 9-10) that, if it should achieve standing to seek judicial review at some future time, it may then enjoy fewer rights than those afforded in the direct review proceeding provided under the FTC Act. However, the fact that Congress has provided for statutory review following promulgation of a rule does not support the conclusion that standing must be found to exist with respect to every petitioner, even if that petitioner has no concrete interest in the review proceeding. Exxon's rights in this respect are no different from those of any other person who cannot establish standing to sue during the period immediately following promulgation of a rule. If, at some time in the future, such a person engages in activities subject to the Rule, or is otherwise able to allege facts sufficient to predicate standing, it may then, as the court of appeals noted (Pet. App. 1a), "contest the validity of the rule or its application in any appropriate future proceeding."[4]

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[3]The Act does afford standing to "interested persons" who are consumers or consumer groups, but that reference has no application to petitioner.

[4]The precise extent of the remedies available in such a future proceeding is, of course, not at issue here. However, future avenues of review may include: (1) judicial review of the Rule in an FTC enforcement proceeding; (2) declaratory relief from the FTC under 5 U.S.C. 554(e), which may, in appropriate cases, be subject to judicial review (*Frozen*

3. Contrary to Exxon's contention (Pet. 15-22), the court of appeals' decision is consistent with the decisions of this Court and the other circuits dealing with mootness issues.[5] Exxon's argument is premised upon its erroneous factual assertion that the Commission considers certain of its business activities to be covered by the Rule (Pet. 6, 15, 19, 20, 21). That assertion, as previously noted (see note 2, *supra*), is unfounded. Exxon's refusal to identify any aspect of its business operations that is currently affected by the Rule renders this case factually distinguishable from the cases on which Exxon relies.[6]

Food Express v. *United States*, 351 U.S. 40 (1956)); and (3) exemption proceedings under Section 18(g) of the FTC Act (15 U.S.C. 57a(g)), which are subject to judicial review (Section 18(g)(3), 15 U.S.C. 57a(g)(3)).

[5]The doctrines of standing to seek review and mootness are closely related in this context. The only basis for standing advanced by petitioner was removed by the Commission's exemption order. Since petitioner has declined to identify any other aspect of its business that would be adversely affected by the challenged rule, the court of appeals properly treated the petition as moot. "Mootness is * * * the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1384 (1973).

[6]Exxon cites nine cases in which this Court has rejected claims of mootness. None of those cases involved a permanent and unqualified exemption from the challenged regulation of the identifiable business activities of the complaining party. *Powell* v. *McCormack*, 395 U.S. 486 (1969) (case not moot because of remaining unresolved claim for unpaid salary); *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199 (1968) (dissolution of association in light of new regulations did not moot suit for injunctive relief because, even under the new regulations, the members would be free to engage in illegal conduct); *Gray* v. *Sanders*, 372 U.S. 368 (1963) (case not rendered moot by holding of primary election when the challenged statute remained in effect); *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37 (1944) (substitution of new compensation plans for old plans did not moot the case because respondent continued to urge the validity of the old plans and was free to resume use of those plans); *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897) (dissolution of association did not moot government suit to restrain similar action under a

Nor does this case fall within the exceptions to the mootness doctrine cited by Exxon (Pet. 16-19). It does not present a situation in which the defendant has temporarily ceased illegal conduct. *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953). The petition for review here is moot because the agency has granted a formal and continuing exemption that removes all of petitioner's identifiable business activities from the purview of the challenged rule. See *Defunis* v. *Odegaard*, 416 U.S. 312, 318-319 (1974); *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631-634 (1979). Similarly, this case does not fall within the exception applicable when the challenged official conduct is "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). In the absence of a class action, this doctrine is limited to situations in which (1) the challenged conduct is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the complaining party will be subjected to the same conduct again. *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975). Here, the Franchise Rule remains in effect and, should Exxon ever identify any interest that arguably might be affected by it, it has available the avenues of judicial review described above. Like the plaintiff in *Weinstein*, Exxon has, up to now, pointed to nothing indicating that it will ever again be subjected to the Rule.

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similar illegal agreement); *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115 (1974) (settlement of labor dispute did not moot case challenging a continuing policy applicable to such disputes); *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911) (expiration of ICC order did not moot challenge to the order when carriers were subject to other short-term orders of the same kind); *Sosna* v. *Iowa*, 419 U.S. 393 (1975) (class action not necessarily mooted if members of the class have a concrete interest that endures after expiration of the interest of the

In sum, Exxon fails to meet the threshold Article III requirement that "the claimant must have a 'personal stake in the outcome,' * * * or a 'particular, concrete injury,' "—as opposed to " 'generalized grievances' " about the conduct of the government. *United States* v. *Richardson*, 418 U.S. 166, 179-180 (1974). As this Court has emphasized, "[t]he requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process. It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome."

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named plaintiff); *Roe* v. *Wade*, 410 U.S. 113 (1973) (natural termination of plaintiff's pregnancy did not moot challenge to abortion statute because pregnancy is capable of repetition).

Likewise, the court of appeals decisions relied on by Exxon are irrelevant here. In *Bethlehem Steel Corp.* v. *Train*, 544 F. 2d 657 (3d Cir. 1976), cert. denied, 430 U.S. 975 (1977), the court held that mere assurances by the government of its enforcement plans with respect to a challenged regulation were insufficient to render the case moot, particularly where the statute in question provided for citizen suits. Here, in contrast, Exxon has received a formal statutory exemption. In *Big Rivers Electric Corp.* v. *EPA*, 523 F. 2d 16 (6th Cir. 1975), cert. denied, 425 U.S. 934 (1976), the court of appeals held that compliance by a state with EPA regulations did not moot review petitions filed by other parties. Here, there is no issue of compliance by other parties. Rather, Exxon's exemption from the challenged Rule makes its petition moot. *Natural Resources Defense Council, Inc.* v. *EPA*, 489 F. 2d 390, 404 (5th Cir. 1974), rev'd on other grounds, 421 U.S. 60 (1975), held that administrative action that fails to afford complete relief sought by the complaining party does not moot the controversy. In this case, in contrast, Exxon was exempted from the Rule on the very ground it urged upon the Commission. It has failed to identify any other respect in which the Rule affects its business. Finally, in *Nader* v. *Volpe*, 475 F. 2d 916 (D.C. Cir. 1973), the court granted review of challenged administrative action that was capable of repetition but evaded review. Here, in contrast, both the Franchise Rule and Exxon's exemption from it are still in effect and are, by their terms, indefinite in duration.

Sierra Club v. *Morton, supra*, 405 U.S. at 740. On the record in this case, Exxon has failed to allege such a direct stake.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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